127
9-4-02

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN CHARLES KENNEY, : Civil Action No. 1:CV-00-2143
Plaintiff, : Honorable Judge J.E. Jones, III
(Presiding)
v. :
:
JAKE MENDEZ; : (Magistrate Judge T.M. Blewitt)
JESUS "JESSE" GONZALEZ; :
JAMES "JIMMY" SCARBOROUGH; and :
KELLY M. KEISER, :
Defendants. :

PRO SE AMENDMENT TO AMEND COMPLAINT PURSUANT TO THE FEDERAL RULES OF CIVIL PROCEDURE 28 USCA §§ 59(e) AND RULE 15

PLAINTIFF-John Charles Kenney, is solely acting pro se in the above captioned civil action, he hereby submits a "Pro Se Amendment" to amend his previously filed complaint of December 12, 2000. Kenney "wishes" to submit the instant amendment to his complaint in order to cure some deficiencies and to clarify some discrepancies. Because a final judgment [1/] has not, yet been entered by the presiding, i.e., district court judge. That, the instant amendment is properly before this Honorable U.S. District Court.

Unfortunately, defendants on September 29, 1999, had "violently" beat Kenney upon his noddle and ophthalmic during his incarceration while he was at U.S. Penitentiary Allenwood, or ("Allenwood-USP"), located in White Deer, Pennsylvania. The indisputed injuries caused to Kenney, inflicted by the defendants were, indeed, "NUMER-

1/ Although, computerized docket entries reflect that the U.S. Magistrate entered summary judgment in favor of the defendants on June 17, 2002. That, Kenney has not, yet received a final judgment from the district court. Kenney had also "timely" filed written objections to the Magistrates proposed findings on June 25, 2002, that were followed by supporting supplemental authorities on June 26, 2002. On July 9, 2002 Kenney filed a "Pro Se Reply Response" to Defs.' Opposition response. Again, Kenney has not received any response from the Magistrate, nor the District Court regarding his "Pro Se Reply."

OUS," thereby sustaining a "valid" Eighth Amendment claim. (See Injury Assessment Follow-Up, dated 9/29/99)(follow-up injury sheet was initially attached to the 12/12/00 complaint, which reflects "six-smitten-blows"). Due to defendants' miscreant acts committed upon and against Kenney. That, he had instituted this Bivens action, suing each of the four-defendant perpetrators (named in the caption of this action) in either their individual and official capacities, or both.

PRO SE LIBERAL CONSTRUCTION GOVERN THIS AMENDMENT

Under the familiar teachings of Haines v. Kerner, 404 U.S. 519-520-21 (9172)("pro se prisoner complaints however inartfully pleaded are held to less stringent standards than formal pleadings drafted by lawyers."). Therefore, Kenney **must** be given "a measure of tolerance." United States ex rel. Montgomery v. Brierly, 414 F.2d 552, 555 (3rd Cir. 1969). Given this liberal tolerance, coupled with leeway affordedd to Kenney in this proceeding. (See "leeway" previously afforded to Kenney by the Court on January 4, 2002. That, Kenney seeks this Court's indulgence in construing this instant amendment.

PRESENTATION OF THE AMENDED ISSUES

1) Discovery is needed in order for Kenney to "fairly" present his case against the defendants;

2) Kenney on February 20, 2002 had demanded a civil trial by jury pursuant to Civ. R. Proc. RULE 38(b). On February 27, 2002 Kenney submitted a brief in support of his 38(b) motion. However, the Magistrate "gelidly" ignored this issue "entirely," thus never ruled upon it. Therefore, Kenney wishes to "renew" his previous demand for a civil trial by jury;

3) Oddly, defendants contend that Kenney "untimely" filed his inmate grievance appeals (intra-prison-levels). However, the Magistrate in its June 17, 2002 Order found that, "[p]laintiff submits **PROOF** that he has, in fact, proceeded through each of the required administrative steps." (See Order, dated 6/17/02, at p. 4)(reflecting)(emphasis added). Kennney's written objections, dated 6/25/02, and his supplemental authorities submitted 6/26/02, and his "Pro Se Reply Response" of 7/9/02. Demonstrates that, Kenney has, indeed, satisfied exhaustion; (See also Attachments One & Two hereto);

4) Since commencement of this action, favorable (relevant) opinions supporting Kenney's case has been decided. Kenney "now" wishes to submit them; (See authorities cited and quoted herein); see also Attachs one & two hereto;

5) The Magistrate had committed "clear error" for failing to provide Kenney with a "fair notice" that his case was going to enter summary judgment phase. This unexpected "surprise" substantially prejudiced Kenney. Where the rug was "snatched" out from underneath him. Kenney never had the opportunity to prepare for such a phase, as one for summary judgment;

6) The Magistrate on January 4, 2002 had opined that Kenney has "an arguably meritorious claim has been stated." (See Magistrate's Order, dated 1/4/02). Based on the "substantial" merits of this case and Kenney's "staggering" inability to fairly present it. That, Kenney "DESPERATELY" moves for the appointment of counsel based upon the following.

NECESSITY OF AMENDMENT AND AUTHORITIES IN SUPPORT

In Kenney's "struggling" pro se stance in prusuit of relief. That, it is merely incumbent upon him to rely on the following au-

thorities available to him in support of this amendment. Kenney "chiefly" relies on an Honorable Third Circuit case and another. See Hamilton v. Leavy, 117 F.3d 742, 750 (3rd Cir. 1997)("remanding with instructions to appoint counsel for [inamte-plaintiff] and to permit him to undertake discovery and to permit him to amend his complaint.")(LEWIS, J.); see also Soto v. Brooklin Correctional - Facility, 80 F.3d 34, 37 (2nd Cir. 1996)("Om remand, the District Court should first permit reasonable discovery . . . and leave to amend."). Because Kenney has, "a colorable Eighth Amendment claim," as in Hamilton. Id. 117 F.3d at 749. But, is "ill-equipped" 2/ to represent himself or to litigate this claim." Id. at 749. Kenney also has psychiatric problems similar to those of Hamilton. Id. at 749. Therefore, Hamilton neatly fits Kenney in his endeavors eloquently described in this amendment.

FAILURE TO AFFORD NOTICE

When the Magistrate "instantaneously" granted defendants' motion on judgment of the pleadings (Doc. 91). Thereby, entering summary judgment in their favor on June 17, 2002. This "prejudiced" Kenney, because, he had not the opportunity to prepare for a RULE 56 phase. See Loma Linday, 213 F.3d 1001, 1006 (8th Cir. 2000)("We suggest that, **on remand**, the District Court give plaintiffs an appropriate opportunity to respond to defendants' motion, this time with a clear understanding that the motion is being treated as one for summary judgment."). Therefore, the Magistrate entered an "erroneous" ruling warranting remand.

2/ Kenney on June 4, 2001 was found "NOT GUILTY ONLY BY REASON OF INSANITY in this Court by a federal jury. See United States v. John C. Kenney, Criminal No. 4:CR-99-0280. Kenney has an extensive psychiatric history past and current.

DISCOVERY-ISSUE

When this Court by Order on March 4, 2002 vacated a prior Order of April 13, 2001. Vacating Kenney's removal from the jurisdiction (of Pennsylvania). The vacation prohibited Kenney from attempting to obtain discovery. (See Order, dated March 8, 2002)(granting [Kenney] an extension of time to respond to Defendants' motion for judgment on the pleadings). As result of the vacation, defendants "immediately" transferred Kenney from the (Pennsylvania) jurisdiction on March 25, 2002. Kenney was in transit, until April 3, 2002. Is when, he had arrived at his current place of confinement, at U.-S. Penitentiary Pollock, located in Pollock, Louisiana. Therefore, Kenney never had the time to adequately prepare, nor attempt to obtain discovery. Thus, Kenney does not even know how to apply for discovery. Therefore, he should be permitted discovery, as in Hamilton, supra, 117 F.3d at 749-50; and Soto, supra, 80 F.3d at 37. Thus, counsel should be appointed to assist Kenney with discovery. See Young v. Quinlan, 960 F.2d 351, 358 (3rd Cir. 1992)("suggesting district court to consider appointing counsel to assist [Young] with discovery and trial.")(NYGAARD, J.)(REMANDED). As in Young, Kenney too requires appointed counsel to assist him with discovery for his (previously demand for a civil trial by jury). Therefore, Kenney request this Honorable Court to appoint him counsel to assist him with his civil trial.

SATISFACTION OF EXHAUSTION PURSUANT TO 42 USCA § 1997e(a)

It is "undisputed" that 28-days, **before** Kenney filed this action. That, he has in fact proceeded through each of the required administrative steps. (Order, dated 6/17/02 p. 4)(reflecting). Al-

though, Kenney's grievance appeals were "rejected" intraprison-levels, as untimely. Such rejections do not bar Kenney's action. According to the "puissant" force of relevant caselaw expounded by Honorable Judge S.L. ROBINSON in, **Santiago v. Fields, 170 F.Supp.2d 453, 458 (D.Del. 2001)**, determining that:

> **"In the case at bar, plaintiff pursued his administrative remedies by filing a grievance form. Although plaintifff allegedly failied to appeal the rejection of his grievance form, the court finds that defendants have presented insufficient evidence to suggest that plaintiff was adequately notified of the rejection and his obligation to appeal it so as to preserve his right to sue. Thus the court determins that plaintiff has exhausted his administrative remedies."**

Santiago, 170 F.Supp.2d at 458 (Emphasis added).

Mounting cases, see also: **Pearson v. Vaughn, 102 F.Supp.2d 282, 288 n. 13 (E.D.Pa. 2000)("no time time limit exists when a response to a grievance will be in the form of a grievance rejection.")**. Hon. Judge BRODY in Pearson adopting the reasoning of Millier v. Tanner, 196 F.3d 1190, 1194 (11th Cir. 1999)(determining that although an inmate-plaintiff failed to appeal the denial of his grievance, plaintiff exhausted his administrative remedies . . . "); Irvin v. Zamora, 161 F.Supp.2d 1125, 1135 (S.-D.Cal. 2001)("As long as the basic purpose of exhaustion are fulfilled there does not appear to be any reason to require a prisoner plaintiff to present fully developed legal and factual claims at the administrative level.")(emphasis added); Curry v. Scott, 249-F.3d 493, 505 (6th Cir. 2001)(no heightened pleading [grievance] requirement can be imposed upon would-be § 1983 plaintiff[]); accord **Ray v. Kertes, 285 F.3d 287, 295-97 (3rd Cir. 2002)("we find that the District Court erred in dismissing the complaint for failure**

to meet the heightened pleading requirement.")(SLOVITER, J.)(REVERSING dismissal of complaint). The "bombardment of Santiago, Pearson, Miller, Irvin, Curry, and Ray, supra. Compels this Court to "REVERSE" the Magistrate's June 17, 2002, Order in Kenney's favor. Thereby, precluding summary judgment for the defendants.

MOTION FOR LEAVE TO APPOINT COUNSEL

The right to appoint civil counsel, however, is not absolute. But, on the same token the U.S. Constitution mandates that plaintiffs and defendants have fair trials. See **Bailey v. Systems Innovation, Inc, 852 F.2d 93, 98 (3rd Cir. 1988)**([its] **"abundantly clear that fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right.")(citations omitted).** No doubt that Kenney has a "colorable" Eighth Amendment claim. (See Order, dated 1/4/02)(reflecting meritorious claim by this Court). In light of that above. That it would be an "awesome travesty" to deny Kenney the appointment of counsel, where he is, **"ill-equipped to represent himself or to litigate this claim." Hamilton, supra, 117 F.3d at 749.** When, Kenney was found "NOT GUITLY ONLY BY REASON OF INSANITY" by this Court on June 4, 2001. **See U.S. v. Kenney, at 4:CR-99-0280. (M.D.Pa.)(McClure, J.).** The verdict alone in Kenney's companion case ably demonstrates that he is, indeed, ill-equipped. Not to mention previous "unrebutted" medical evidence submitted to this court in the instant case. Honorable Third Circuit Court Justice LEWIS in Hamilton explicated that:

> **"[T]he record indicates that Hamilton may be ill-equipped to represent himself or to litigate this claim inasmuch as there is unrebutted medical evidence that he suffers from a paranoid delusional disorder. The district court's failure to consider the weight of this fact demonstrates that more serious consideration**

> **should have been given to Hamilton's request for the appointment of counsel. We will therefore reverse on this issue and remand to the district court with instructions to appoint counsel for Hamilton."**

Hamilton, supra, 117 F.3d at 749 (Emphasis added).

Besides, Kenney does not know how to apply, nor attempt to apply for discovery, even though, he has a colorable claim. See **Hamilton. Id at 749 ("Hamilton does have a colorable Eighth Amendment claim. We will, therefore, remand this issue to the district court with instructions to permit Hamilton to pursue full and reasonable discovery.")(emphasis added).** Moreover, this Court has repeatedly appointed counsel for inmate-plaintiff(s). See Maclean v. Secor, 876 F.Supp. 695, 698 n. 1 (E.D.Pa. 1995)(Court appointed counsel for inmate-plaintiff in a civil case against the BOP)(BRODY, J.); Gibbs v. Ryan, 160 F.3d 160-62 (3rd Cir. 1998)(district court had granted inmate-plaintiff appointed counsel to assist in filing an appeal.); Fuente v. Wagner, 206 F.3d 335, 338 n. 2 (3rd Cir. 2000) (counsel appointed to represent inmate-plaintiff even in an unsuccessful "excessive force" claim.); Young v. Quinlan, supra, 960 F.2d at 358 (suggesting district court to consider appointing counsel to assist inmate plaintiff with discovery and trial.)(NYGAARD, J.); Santiago v. Fields, supra, 170 F.Supp.2d at 460 (court granting inmate-plaintiff civil counsel to represent him in his "excessive-force" case.)(ROBINSON, J.); Pearson v. Vaughn, supra, 102 F.Supp.2d at 284 **("I granted plaintiff's motion for appointment of counsel.") (BRODY, J.)**; Parham v. Johnson, 126 F.3d 454, 460 (3rd Cir. 1997) (court appointed counsel for inmate-plaintiff to argue meritorious, and complexity of issue involved); Lastly, Ray v. Kertes, supra, 285

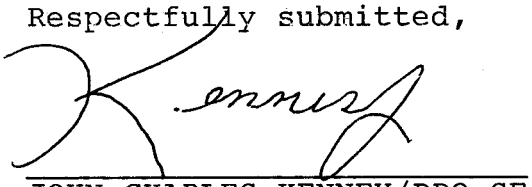
F.3d at 289 n. 1 **(Hon. Third Circuit Justice appointing civil representation for inmate-plaintiff)(SLOVITER, J.).**

"Propounded" by these interpretive authorities above. Teaches, Kenney that this Court has "vary" broad discretionary powers in the appointment of counsel. Therefore, Kenney request the Court to appoint him counsel, because he is "ill-equipped" to represent himself, thus, he is unable to litigate beyond this stage of the proceedings. Based upon Kenney's "umpteen" request throughout this case, is a sheer indication. That, Kenney does not know how to proceed any further. Thus, his catatonic state of mind prohibits him from litigating. Kenney's "exacerbated-conniption" no doubt warrants serious consideration for the appointment of counsel in this particular case. Therefore, Kenney must, as he does request this Court to appoint him competent civil counsel.

CONCLUSION

For all the reasons contained herein, where there exists issues of material facts that a reasonable minded juror could conclude in Kenney's favor. That, this Honorable Court should allow Kenney leave to amend, thus appoint him counsel.

Respectfully submitted,



JOHN CHARLES KENNEY/PRO SE
Register No. 05238-041
USP-Pollock
P.O. Box 2099
Pollock, Louisiana 71467-2099

Dated: August 28, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN CHARLES KENNEY, Plaintiff, v. JAKE MENDEZ; JESUS "JESSE" GONZALEZ; JAMES "JIMMY" SCARBOROGH; and KELLY M. KEISER, Defendants.	: : : : : : : :	Civil Action No. 1:CV-00-2143 Honorable Judge J.E. Jones, III (presiding) (Magistrate Judge T.M. Blewitt)

SUBMISSION OF INTERVENING PRECEDENT AND REVISED AUTHORITIES IN SUPPORT OF PRO SE AMENDMENT

PLAINTIFF-John Charles Kenney, acting pro se in the above captioned action hereby submits the following "Intervening Precedents and Revised Authorities" in support of his amended complaint. Since, commencement of this action of 12/12/00. The following authorities have been decided, thereby, "fortifying" Kenney's claims. **"Failure To Afford Notice:"** Country Club Estates, L.L.C. v. Town of Loma Linda, 213 F.3d 1001, 1006 (8th Cir. 2000). See, p. 4; **"Grievance Appeal Rejections:"** Santiago v. Fields, 170 F.Supp.2d 453, 458 (D.Del.Cal. 2001); Irvin v. Zamora, 161 F.Supp.2d 1125, 1135 (S.D.Cal. 2001); Curry v. Scott, 249 F.3d 493, 505 (6th Cir. 2001); Ray v. Kertes, 285 F.3d 287, 295-97 (3rd Cir. 2002). See, p. 6; **"Appointment Of Counsel:"** Santiago, supra,; Ray, supra,. See, p. 8-9. **"Recent Opinion Added ." See Montgomery v. Pinchak, 294-F.3d 492, 505-06 (3rd Cir. 2002)("Montgomery's ability to meet the evidentiary requirements of the defendants' summary judgment motion was prejudiced by the District Court's refusal to appoint counsel. Under these circumstances, we will vacate the District Court's grant of summary judgment, and remand this case for further proceedings consistent with this opinion.")(FUENTES, J.)(Vacated and remanded).**

"Discovery:" Peate v. McCann, 294 F.3d 879, 885 (7th Cir. 2002) ("Once again, in light of the remand for trial, it will be open to the district court to consider alternative options that will permit [Inmate]**-Peate additional discovery . . ."))(WOOD, J.). "The Failure To Intervene:" Smith v. Mensinger, 293 F.3d 641, 655 (3rd Cir. 2002)("We also hold that correctional officers have a duty to intervene when other officers use excessive force irrespective of the rank of the offending officers."))(MCKEE, J.);** see also, Peate, 294 F.3d at 883 ("At a minimum, [prison-official] actions could demonstrate a disregard for Peate's safety . . . "). Defendant-Scarborough pinned Kenney's limbs, while defendant-Gonzales had "repeatedly" struck Kenney with LARGE-SHARP-METAL-KEYS. Defendant-Keiser stood mute while defendants-Gonzalez and Scarborough had violently beat Kenney. (See Initial Complaint, p. 2)(reflecting.); see also **Brooks v. Kyler, 204 F.3d 102, 109 (3rd Cir. 2000)(superficial lacerations and abrasions inflicted by defendants upon the inmate-plaintiff constituted "excessive force" resulting in Eighth Amendment violation))(BECKER, C.J.).**

Tandemly, these above authorities confutely girt Kenney's entire complaint. Thereby, fortifying his claims in his complaint. Based upon this fortification that, Kenney here presents them for support of his amended complaint, as necessary.

Respectfully submitted,

Dated: August 28, 2002

JOHN CHARLES KENNEY/PRO SE
Register No. 05238-041
USP-Pollock
P.O. Box 2099
Pollock, Louisiana 71467-2099

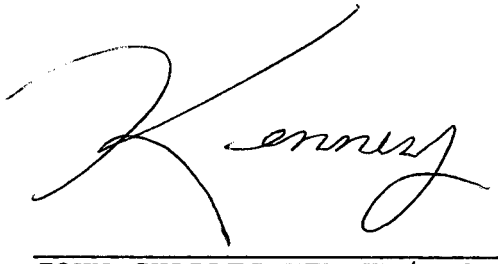
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN CHARLES KENNEY, Plaintiff, v. JAKE MENDEZ; JESUS "JESSE" GONZALEZ; JAMES "JIMMY" SCARBOROUGH; and KELLY M. KEISER, Defendants.	: : : : : : : : :	Civil Action No. 1:CV-00-2143 Honorable Judge J.E. Jones, III (Presiding) (Magistrate Judge T.M. Blewitt) **"PRO SE LEAVE FOR AMENDMENT"**

CERTIFICATE OF SERVICE

NOW COMES, John Charles Kenney, acting pro se certifies that on this Wednesday, August 28, 2002. That, I had forwarded defendants' representative a true copy of the foregoing "PRO SE LEAVE FOR AMENDMENT" by placing said contents in a post paid, self addressed envelope, mailed first class to the below address:

c/o The Honorable Terz
U.S. Attorney's Office
Federal Building, Ste. 316
U.S. District Courthouse
240 West Third Street
Williamsport PA 17701-6465



JOHN CHARLES KENNEY/PRO SE
Register No. 05238-041

Pro Se Plaintiff-Kenney's
Attachment/Exhibits In Support Of His Amended Complaint
Civil Action No. 1:CV-00-2143

ATTACHMENT ONE

Utility District No. 1 v. Broadview Television Co., 91 Wash.2d 3, 586 P.2d 851 (1978), Sharp claims that "where a contract has omitted clear terms of payment or left them to unsuccessful future negotiations, the contract becomes unenforceable." Def.'s Reply Mem. at 3. The court disagrees with Sharp's broad proposition.

The Supreme Court of Washington has made clear that "[i]t is not necessarily fatal to the formation of a contract that the parties did not agree on the exact amount to be paid by the purchaser." *Howard v. Fitzgerald*, 58 Wash.2d 403, 363 P.2d 386, 388 (1961). In that particular case, the court held that a seller's offer to sell equipment at a "reasonable value" and inventory at "wholesale value" was not fatal to the formation of a contract. *Id.*; *see also Combs v. Frigid Foods Prods., Inc.*, 67 Wash.2d 862, 410 P.2d 780, 782 (1966) ("An agreement is not unenforceable for lack of definiteness of price or amount if the parties specify a practicable method by which the amount can be determined by the court without any new expression by the parties themselves.").

In the case at bar, the price term of the TSA has two components: A base of $144,200, and an annual increase "not to exceed 6% ... [and] to be mutually agreed upon by the parties." This sort of fee augmentation arrangement is typically referred to as an "escalator clause" and is normally enforceable provided its terms are sufficiently definite. *See* 17A Am.Jur. Contracts 2d § 207 (1991). Ackerley does not dispute that an amount "to be mutually agreed upon" is ambiguous. That is why their claim for relief is only for the base price of $144,200. Sharp, however, argues that the ambiguity of the escalator clause somehow renders the entire TSA unenforceable. Sharp is mistaken. In *Seattle–First National Bank v. Earl*, 17 Wash. App. 830, 565 P.2d 1215 (1977), *pet. denied*, 89 Wash.2d 1017 (1978), the Washington Court of Appeals was faced with a similar situation. In that case, a dispute had arisen over an escalator clause in a lease. The lease's escalator clause tied annual rent increases to a "cost-of-living index for the City of Spokane." *Id.* at 1217. However, after the lease had been entered into, the parties discovered that there was no such thing as a cost-of-living index for Spokane. The lessor filed suit to reform or rescind the contact. The court refused to reform the contract to incorporate an existing cost-of-living index for Seattle, and the court likewise refused to rescind the contract. The proper remedy, according to the court, was simply to give the escalator clause no effect and to otherwise hold the lease enforceable. *See id.* at 1219. This court therefore holds that, in the instant case, the TSA is not unenforceable under Washington law for lack of definiteness as to price.

The cases cited by Sharp are not on point. In *Washington Chocolate*, goods for sale in the purported contract were "Chocolate Coatings ... at current price list." *Wash. Chocolate*, 138 P.2d at 196 (Wash.1943). The court held that a description was too indefinite to form a binding contract given that "different prices were charged to different buyers and that this was at the discretion of [the seller]." *Id.* at 198–99. The case at bar is distinguishable in that there was a price to which the parties did agree, which Sharp actually paid in 1999–2000 and 1999–2000). Moreover, the contract in *Washington Chocolate* was still executory, whereas Sharp has alleged that Ackerley wholly performed its obligations under the TSA. *See id.* at 199.

Randall is altogether inapposite. There it concerned an ambiguity as to the duration, *see Randall*, 153 P.2d at [illegible] and *Snohomish County P.U.D. No.* [illegible] ally runs counter to Sharp's argument, *see Snohomish County P.U.D. No. 1*, 586 P.2d at 857 ("[A] contract which has been partially performed, even though it may be too indefinite to enforce in an action for specific performance, or to support a recovery of damages for failure to perform, is enforceable to the extent that performance has made its terms certain.").

In sum, the TSA is not unenforceable under Washington law for lack of definiteness as to price.

Sufficiency of the Pleadings

[6] Finally, Sharp argues that the complaint must be dismissed because "there are no *specific* allegations that plaintiff performed during 2000–2001." Def.'s Mem. at 6 (emphasis added). Apparently Sharp believes that an "absence of itemized averments of [Ackerley's] performance" is somehow fatal to Ackerley's claim. *Id.* at 7.

The plain language of Fed.R.Civ.P. 9(c) does not seem to indicate otherwise. According to Rule 9(c), "[i]n pleading performance or occurrence of conditions precedent it is sufficient to aver generally that all conditions precedent have been performed or have occurred." Perhaps because this language is so straightforward, there is relatively little case law interpreting the rule. The court knows of no Second Circuit case passing on the matter, but other circuits have made clear long ago that a general averment of performance is sufficient to withstand a motion to dismiss. *See, e.g., Fitz–Patrick v. Commonwealth Oil Co.*, 285 F.2d 726, 729 (5th Cir.1960) ("Rule 9(c) specifically exempts the pleader from the necessity of alleging detailed supporting facts to show the performance of conditions precedent."); *Topping v. Fry*, 147 F.2d 715, 718 (7th Cir.1945) ("We think the complaint sufficiently complied with Rule 9(c) which permits a general averment that all conditions precedent have been performed or have occurred."). In its complaint Ackerley has pleaded that "Ackerley Media fully performed its obligations as required by the contract for the 2000–2001 NBA season." Compl. ¶ 19. That alone is sufficient for Rule 9(c) purposes.

IV. CONCLUSION

For the foregoing reasons, defendant Sharp's motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) must be DENIED.

Noel L. SANTIAGO, Plaintiff,

v.

Michael FIELDS, Barry Newman, Robert Flint, William Harriford and Kevin Senato, Defendants.

No. 00–1058–SLR.

United States District Court, D. Delaware.

Oct. 17, 2001.

Prisoner brought § 1983 action against corrections officers for civil rights violations, cruel and unusual punishment, and assault. Defendants moved to dismiss. The District Court, Sue L. Robinson, J., held that: (1) prisoner had exhausted his administrative remedies; (2) factual dispute precluded summary judgment on issue of whether defendants used excessive force against prisoner; (3) defendants were not entitled to qualified immunity; and (4)

State had not waived Eleventh Amendment immunity.

Motion granted in part and denied in part.

1. Federal Civil Procedure ⇐2533.1

Motion to dismiss for failure to state a claim was treated as motion for summary judgment, where parties referred to matters outside the pleadings, in prisoner's § 1983 action for cruel and unusual punishment. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Convicts ⇐6

Before filing a civil action on an excessive force claim, a prisoner must exhaust his administrative remedies, even if ultimate relief sought is not available through the administrative process. Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a).

3. Convicts ⇐6

Prisoner had exhausted his administrative remedies, as required before filing civil action on an excessive force claim, even though prisoner allegedly failed to appeal rejection of his grievance form; defendants presented insufficient evidence to suggest that prisoner was adequately notified of the rejection and his obligation to appeal it so as to preserve his right to sue. Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a).

4. Sentencing and Punishment ⇐1548

In cases where inmates challenge use of force by prison officials as excessive, Eighth Amendment is key source of protection. U.S.C.A. Const.Amend. 8.

5. Prisons ⇐13(4)

Pivotal inquiry in prisoner's claims of excessive force is whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

6. Prisons ⇐13(4)

In analyzing prisoner's claims of use of excessive force by corrections officers, court must consider (1) need for application of force, (2) relationship between the need and amount of force that was used, (3) extent of injury inflicted, (4) extent of the threat to safety of staff and inmates, as reasonably perceived by responsible officials on basis of facts known to them, and (5) any efforts made to temper severity of a forceful response.

7. Federal Civil Procedure ⇐2491.5

In a prisoner's claims for use of excessive force by corrections officers, defendants cannot prevail on motion for summary judgment if it appears that evidence viewed in light most favorable to plaintiff will support a reliable inference of wantonness in infliction of pain.

8. Federal Civil Procedure ⇐2491.5

Genuine issues of material fact existed as to whether prison officers used excessive force against prisoner, precluding summary judgment for officers in prisoner's § 1983 action for cruel and unusual punishment. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

9. Civil Rights ⇐214(2)

Government officials performing discretionary functions have "qualified immunity" and are immune from liability for civil damages, given that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

See publication Words and Phrases for other judicial constructions and definitions.

10. Civil Rights ⇐214(2)

A right is "clearly established" for purposes of qualified immunity when contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right.

See publication Words and Phrases for other judicial constructions and definitions.

11. Civil Rights ⇐214(1, 2)

When analyzing a qualified immunity defense, court must first ascertain whether plaintiff has alleged violation of a constitutional right at all, then inquire whether right was clearly established at time defendants acted, and finally determine whether reasonable person in official's position would have known that his conduct would violate that right.

12. Civil Rights ⇐214(2)

In court's analysis of a government official's qualified immunity defense, if on objective basis it is obvious that no reasonably competent official would have concluded that actions were lawful, defendants are not immune from suit; however, if officials of reasonable competence could disagree on issue, immunity should be recognized.

13. Federal Civil Procedure ⇐2491.5

Fact question as to whether correctional officers used excessive force precluded summary judgment for officers based on qualified immunity, in prisoner's § 1983 action for violation of Eight Amendment right; prisoner's right against excessive force was clearly established at time of the events, and there was genuine dispute as to whether force used was excessive. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

14. Federal Courts ⇐269

Eleventh Amendment protected correctional officers from liability, in their official capacities, from prisoner's § 1983 action for excessive force; Delaware had not consented to prisoner's suit or waived immunity. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1983.

15. Federal Courts ⇐265, 267, 269

In the absence of consent, a suit in federal court in which state or one of its agencies or departments is named as defendant is proscribed by Eleventh Amendment. U.S.C.A. Const.Amend. 11.

16. Federal Courts ⇐269

Eleventh Amendment's preclusion of a state from suit in federal court includes state officials when state is the real, substantial party in interest. U.S.C.A. Const. Amend. 11.

17. States ⇐191.10

Relief sought nominally against an official is in fact against the sovereign, if decree would operate against the latter.

18. Federal Courts ⇐266.1

A state may waive its immunity under Eleventh Amendment, but such waiver must be in form of an unequivocal indication that state intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. U.S.C.A. Const.Amend. 11.

Noel L. Santiago, Smyrna, DE, pro se.

Gregory E. Smith, Dept. of Justice, Wilmington, DE, for defendants.

MEMORANDUM ORDER

SUE L. ROBINSON, District Judge.

I. INTRODUCTION

On November 30, 2000, plaintiff Noel L. Santiago filed this action alleging civil rights violations under 42 U.S.C. § 1983 and violations of his Eighth Amendment right to be free from cruel and unusual

punishment. (D.I. 2 at 3) Plaintiff alleges that defendants are also liable for assault arising out of an unwarranted beating that occurred on July 19, 2000. (*Id.*) Plaintiff seeks compensatory and punitive damages. (*Id.* at 4)

Currently before the court is defendants' motion to dismiss plaintiff's complaint for failure to exhaust administrative remedies and for failure to state a claim. (D.I.12) For the reasons stated below, defendants' motion to dismiss is granted in part and denied in part.

II. BACKGROUND

Plaintiff is an inmate within the Delaware Department of Correction and at the time of the complaint was housed at the Multi–Purpose Criminal Justice Facility ("Gander Hill") in Wilmington Delaware. (D.I. 16 at ¶ 1) Plaintiff has since been transferred to the Delaware Correctional Center in Smyrna, Delaware. (*Id.* at ¶ 2) Plaintiff alleges that on or about July 19, 2000 he was in an interview room preparing to serve five days for a "write-up" when he was assaulted by four correction officers and a sergeant of the Quick Response Team. (D.I. 2 at 3) Plaintiff contends that defendants used excessive force against him in that they kicked and struck him several times in the face and back and used a legsweep that caused him to fall face first to the floor. (*Id.*) Plaintiff alleges that, during the assault, he was handcuffed behind his back and defendants were insinuating that the assault was being carried out because plaintiff was a party in a pending lawsuit about the living conditions at Gander Hill. (*Id.*)

After the assault, plaintiff alleges defendants took him to the infirmary for examination and treatment of his injuries. (*Id.*) Plaintiff contends that he received x-rays and other medical treatment on July 20, 2000. (*Id.*) Plaintiff alleges that upon being escorted from the infirmary to 1F/Pod Cell # 5 by defendants, they again engaged in assaulting him. (*Id.*) Defendants again allegedly struck plaintiff in the face and back and employed another legsweep, causing plaintiff to fall to the floor. (*Id.*) While on the floor, plaintiff contends that defendant Sergeant Kevin Senato sprayed "tear gas" in his face. (*Id.*) Plaintiff maintains that during both encounters he did not resist or threaten defendants in any way or break any prison rules that warranted such treatment. (*Id.*)

Plaintiff filed a grievance form on August 3, 2000. (*Id.*, Ex. A) He claims that prison officials have yet to respond to the grievance. (*Id.* at 2)

According to an affidavit submitted by Sergeant Senato, plaintiff was transported to the disciplinary unit because of an unrelated incident on July 19, 2000. (D.I. Ex. C at ¶ 3) Sergeant Senato admits that physical force was used, but only after plaintiff became "unruly and violent," and that the force used was appropriate and proportional to plaintiff's actions. (*Id.* ¶ 4) Plaintiff allegedly resisted as full possible and suffered a bloody nose, mouth as a result of the encounter. Sergeant Senato admits that a cap was used on plaintiff, but the use necessitated by plaintiff locking his on, and attempting to bite off, Ser Senato's left middle finger. (*Id.* Sergeant Senato was left with the of plaintiff's teeth and a deep bone (*Id.*) Sergeant Senato also denies t assault was in retaliation of any and maintains that he was not awa plaintiff was a party to any lawsu at ¶ 7) Attached to Sergeant Senat davit is a letter from plaintiff to Se Senato apologizing for his behavio at 4)

Defendants also submit an affi Sergeant Mary Moody, who was re

ble for resolving informal inmate grievances at all times relevant to this action. (*Id.*, Ex. A at ¶ i) While plaintiff alleges that prison officials have not responded to his grievance, Sergeant Moody contends that she has reviewed all records of grievances filed by plaintiff, and that plaintiff's grievance was rejected as untimely and plaintiff has not appealed the rejection. (*Id.* at ¶¶ ii, iii)

III. STANDARD OF REVIEW

[1] Since the parties have referred to matters outside the pleadings, defendants' motion shall be treated as one for summary judgment. *See* Fed.R.Civ.P. 12(b)(6). A party is entitled to summary judgment only when the court concludes that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the burden of proving that no material issue of fact is in dispute. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n. 10, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Once the moving party has carried its initial burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 587, 106 S.Ct. 1348 (quoting Fed. R.Civ.P. 56(e)). "Facts that could alter the outcome are 'material', and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." *Childers v. Fed. Kemper Life Assurance Co.*, 72 F.3d 300, 302 n. 1 (3d Cir.1995). If the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The mere existence of some evidence in support of the nonmoving party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that factual issue. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). This court, however, must "view all the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir.1995).

IV. DISCUSSION

A. Exhaustion of Administrative Remedies

[2] Defendants argue that plaintiff did not exhaust his administrative remedies prior to filing this action pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a).[1] Before filing a civil action on an excessive force claim, a plaintiff-inmate must exhaust his administrative remedies, even if the ultimate relief sought is not available through the administrative process. *See Booth v. Churner*, 206 F.3d 289, 300 (3d Cir.2000), *cert. granted*, 531 U.S. 956, 121 S.Ct. 377, 148 L.Ed.2d 291 (2000), *aff'd*, 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). *See also Ahmed v. Sromovski*, 103 F. Supp.2d 838, 843 (E.D.Pa.2000) (quoting *Nyhuis v. Reno*, 204 F.3d 65, 73 (3d Cir.2000)) (stating that § 1997e(a) "specifically mandates that in-

1. PLRA provides, in pertinent part:
No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.
42 U.S.C. § 1997e(a).

mate-plaintiffs exhaust their available administrative remedies."). The courts are split, however, on whether assault and excessive force constitute "prison conditions" for purposes of exhaustion under 42 U.S.C. § 1997e(a). *See, e.g., Booth*, 206 F.3d at 293–99; *contra Nussle v. Willette*, 224 F.3d 95, 106 (2d Cir.2000), *cert. granted, Porter v. Nussle* — U.S. —, 121 S.Ct. 2213, 150 L.Ed.2d 207 (June 4, 2001) (00–853).

[3] In the case at bar, plaintiff pursued his administrative remedies by filing a grievance form. Although plaintiff allegedly failed to appeal the rejection of his grievance form, the court finds that defendants have presented insufficient evidence to suggest that plaintiff was adequately notified of the rejection and his obligation to appeal it so as to preserve his right to sue. Thus, the court determines that plaintiff has exhausted his administrative remedies.

B. Plaintiff's Eighth Amendment Claim

[4–7] In cases where inmates challenge the use of force by prison officials as excessive, the Eighth Amendment is their key source of protection. *See Whitley v. Albers*, 475 U.S. 312, 327, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). The pivotal inquiry in claims of excessive force is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), *construed in Whitley*, 475 U.S. 312, 106 S.Ct. 1078. The court must consider: 1) the need for the application of force; 2) the relationship between the need and the amount of force that was used; 3) the extent of injury inflicted; 4) the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them; and 5) any efforts made to temper the severity of a forceful response. *See Whitley*, 475 U.S. at 321, 106 S.Ct. 1078 (citations omitted). Defendants cannot prevail on a motion for summary judgment if "it appears that the evidence viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain." *Id.* at 322, 106 S.Ct. 1078; *see also Sample v. Ruettgers*, 704 F.2d 491, 495 (10th Cir. 1983) (finding wantonness when prison guard intended to harm inmate).

[8] Defendants maintain that the force used was necessary only to subdue plaintiff and protect their safety when he became combative on July 19, 2000. They rely on an affidavit from Sergeant Sen[illegible] which states that plaintiff's claims of excessive force were unwarranted. While the application of some force may have been necessary to transfer plaintiff to the disciplinary unit, plaintiff claims that he was handcuffed behind his back at all time, reducing the threat of harm to defendants. Thus, the court finds that there exists a genuine issue of material fact as to whether defendants used excessive force against plaintiff.

C. Qualified Immunity

[9, 10] Defendants contend that they cannot be held liable in their individual capacities under the doctrine of qualified immunity. (D.I. 13 at ¶ 8) Government officials performing discretionary functions are immune from liability for civil damages, given that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). A right is "clearly established" when "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *accord In re City of Philadelphia Litig.*, 49 F.3d 945, 961 (3d Cir.1995).

[11, 12] When analyzing a qualified immunity defense, the court must first ascertain "whether plaintiff has [alleged] a violation of a constitutional right at all." *Larsen v. Senate of the Com. of Pa.*, 154 F.3d 82, 86 (3d Cir.1998). Next, the court must inquire whether the right was 'clearly established' at the time the defendants acted." *In re City of Philadelphia Litig.*, 49 F.3d at 961 (quoting *Acierno v. Cloutier*, 40 F.3d 597, 606 (3d Cir. 1994)). Finally, the court must determine whether " 'a reasonable person in the official's position would have known that his conduct would violate that right.' " *Open [illegible] Ltd. v. Chester County Sheriff's [illegible]*, 24 F.Supp.2d 410, 419 (E.D.Pa. [illegible] (quoting *Wilkinson v. Bensalem [illegible]ship*, 822 F.Supp. 1154, 1157 (E.D.Pa. [illegible] (citations omitted)). If on an objective basis " 'it is obvious that no reasonably competent [official] would have concluded that the actions were lawful],' " defendants are not immune from suit; however, if officials] of reasonable competence could disagree on this issue, immunity should be recognized.' " *In re City of [illegible]elphia Litig.*, 49 F.3d at 961–62 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

In the case at bar, plaintiff has adequately stated a claim for an Eighth Amendment excessive force violation. Also, at the time of the events at issue, plaintiff's Eighth Amendment right against excessive force was clearly established. Because the court finds that there exists a genuine issue of material fact as to whether defendants used excessive force against plaintiff, defendants are not entitled to qualified immunity at this time.[2]

D. Eleventh Amendment Immunity

[14–18] Defendants contend that they cannot be held liable in their official capacities under the Eleventh Amendment. (D.I. 13 at ¶¶ 7, 10–11) "[I]n the absence of consent, a suit [in federal court] in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). This preclusion from suit includes state officials when "the state is the real, substantial party in interest." *Id.* at 101, 104 S.Ct. 900 (quoting *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945)). "Relief sought nominally against an [official] is in fact against the sovereign, if the decree would operate against the latter." *Id.* (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58, 83 S.Ct. 1052, 10 L.Ed.2d 191 (1963)). A State, however, may waive its immunity under the Eleventh Amendment. Such waiver must be in the form of an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Ospina v. Dep't. of*

2. Defendants also contend that they are immune from personal liability under the State Tort Claims Act. *See* 10 Del. C. § 4001; *see also Smith v. New Castle County Vo–Technical School District*, 574 F.Supp. 813 (D.Del. 1983) (Section 4011(c) extends immunity from liability to employees. *See* 10 Del. C. § 4011(c)). However, "[a]n employee may be personally liable for acts or omissions causing ... bodily injury ... for those acts which were not within the scope of employment or which were performed with wanton negligence or willful and malicious intent." *Id.* The court finds that defendants are not entitled to immunity under the State Tort Claims Act at this time.

Corrs., 749 F.Supp. 572, 578 (D.Del.1990) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n. 1, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985)). Because the State of Delaware has not consented to plaintiff's suit or waived its immunity, the Eleventh Amendment protects defendants from liability in their official capacities.

V. CONCLUSION

Therefore, at Wilmington, this 17th day of October, 2001;

IT IS ORDERED that defendants' motion to dismiss (D.I.12) is denied with respect to plaintiff's claims against defendants in their individual capacities and granted with respect to plaintiff's claims against defendants in their official capacities.

IT IS FURTHER ORDERED that plaintiff's motion for representation by counsel (D.I.15) is granted. The court will direct the Clerk of Court to refer representation of plaintiff to a member of the Federal Civil Panel.

KEY NUMBER SYSTEM

Eric AMARO, Plaintiff,

v.

Stanley TAYLOR, Raphael Williams, M. Jane Brady, C/O Mason, C/O Harriford, Sgt. Sheets, Sgt. Senato, Lt. Taylor, Lt. Polk and Qrt Members 4–12 Shift, Defendants

No. 00–741–SLR.

United States District Court, D. Delaware.

Oct. 25, 2001.

Prisoner brought § 1983 action against corrections officials, alleging cruel and unusual punishment and assault and battery. Defendants moved to dismiss. The District Court, Robinson, J., held that: (1) prisoner exhausted his administrative remedies; (2) three officials had no personal involvement in alleged incidents; and (3) remaining defendants were not entitled to qualified immunity.

Motion granted in part and denied in part.

1. Federal Civil Procedure ⇐657.5(1)

Where plaintiff is a pro se litigant court has obligation to construe complaint liberally.

2. Convicts ⇐6

Before filing civil action on excessive force claim, a prisoner must exhaust all administrative remedies, even if ultimate relief sought is not available through the administrative process. Civil Rights of Institutionalized Persons Act, § 7(a), as amended, 42 U.S.C.A. § 1997e(a).

3. Convicts ⇐6

A prisoner has exhausted his available administrative remedies when he has filed a grievance to which prison officials failed to respond. Civil Rights of Institutionalized Persons Act, § 7(a), as amended, 42 U.S.C.A. § 1997e(a).

4. Civil Rights ⇐194

Prisoner exhausted his administrative remedies, as required for filing civil rights action on excessive force, when prisoner filed grievance form over alleged beating and prison officials failed to respond. Civil Rights of Institutionalized Persons Act, § 7(a), as amended, 42 U.S.C.A. § 1997e(a); 42 U.S.C.A.

5. Federal Courts ⇐269

Eleventh Amendment barred prisoner's action for cruel and unusual punishment and assault and battery against Corrections Commissioner, Warden, and Attorney General in their official capacities. U.S.C.A. Const.Amends. 8, 11.

6. Civil Rights ⇐207(2)

Doctrine of respondeat superior barred prisoner's § 1983 action for cruel and unusual punishment and assault and battery against Corrections Commissioner, Warden, and Attorney General in their individual capacities; officials had no personal involvement in alleged beating of prisoner, U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

7. Civil Rights ⇐205(1)

Doctrine of respondeat superior is not suitable basis for liability under § 1983; personal involvement by a defendant is essential in a civil rights action. 42 U.S.C.A. § 1983.

8. Civil Rights ⇐204.1, 234

Allegations of personal direction or of actual knowledge and acquiescence by a defendant are adequate to demonstrate personal involvement, for purpose of section 1983 liability; such allegations are required to be made with appropriate particularity. 42 U.S.C.A. § 1983.

9. Civil Rights ⇐214(2)

Government officials performing discretionary functions are immune from liability for civil damages under doctrine of "qualified immunity," provided that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

See publication Words and Phrases for other judicial constructions and definitions.

10. Civil Rights ⇐214(2)

For purposes of qualified immunity of government official, a right is "clearly established" when the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right.

See publication Words and Phrases for other judicial constructions and definitions.

11. Civil Rights ⇐214(1)

In analyzing a qualified immunity defense, court must first ascertain whether plaintiff has alleged violation of a constitutional right at all.

12. Civil Rights ⇐214(2)

In analyzing a qualified immunity defense to allegations of civil rights violation, court must inquire whether right allegedly violated by government official was clearly established at time defendant acted, and then determine whether a reasonable person in official's position would have known that his conduct would violate that right; if officers of reasonable competence could disagree on this issue, immunity should be recognized.

13. Civil Rights ⇐214(7)

Corrections officers were not entitled to qualified immunity in prisoner's § 1983 action for cruel and unusual punishment and assault and battery; Eighth Amendment right against excessive force was clearly established such that no reasonably competent officer would conclude that alleged actions were consistent with governing legal principles. U.S.C.A. Const. Amend. 8; 42 U.S.C.A. § 1983.

Nancy Eileen Whinnery, West Chester, PA, for plaintiff.

Gregory E. Smith, Department of Justice, Wilmington, DE, for defendants.

ATTACHMENT TWO

Furthermore, a mere assertion that plaintiff has suffered emotional distress as a result of defendant's actions will not suffice to establish the prima facie case for the tort. Pennsylvania requires that the plaintiff substantiate the claim that she feels distress, "a minimal element of the tort," with "competent medical evidence." *Kemp v. Philadelphia Housing Authority,* 1999 U.S.Dist. LEXIS 16130, at *3, 1999 WL 975121 (E.D.Pa. Oct. 5, 1999) (citing *Nowosad v. Villanova Univ.,* 1999 U.S.Dist. LEXIS 7319, 1999 WL 322486 (E.D.Pa. May 19, 1999)). Plaintiff admits that she has never seen a mental health professional to discuss her "severe emotional turmoil," (Pl.'s Dep., at 183), and can offer no evidence as to how the rumors and allegations have affected her emotional or psychological state. Thus, plaintiff cannot sustain the *prima facie* elements of a claim for intentional infliction of emotional distress and defendant is entitled to summary judgment as a matter of law.

KEY NUMBER SYSTEM

Richard PEARSON, Plaintiff,

v.

Donald VAUGHN, et. al., Defendants.

No. CIV. A. 97–6942.

United States District Court,
E.D. Pennsylvania.

June 26, 2000.

Prisoner brought § 1983 action against prison official, alleging that they failed to protect him against attack by other inmates in violation of his Eighth Amendment rights. Upon officials' motion for summary judgment, the District Court, Anita B. Brody, J., held that: (1) deputy superintendent could not be held liable since inmate failed to show any participation, knowledge or acquiescence in alleged constitutional violation resulting from inmate's placement back in general prison population after a stabbing, and summary judgment was precluded in favor of other official on the merits or on basis of qualified immunity.

Motion granted in part and denied in part.

1. Convicts ⇐6

Before filing a federal lawsuit, a prisoner must exhaust his administrative remedies under Prison Litigation Reform Act (PLRA), even if the ultimate relief sought is not available through the administrative process. Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a).

2. Convicts ⇐6

An inmate's failure to comply with Prison Litigation Reform Act's (PLRA) exhaustion requirement constitutes an affirmative defense to inmate's federal lawsuit. Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a).

3. Civil Rights ⇐194

Prisoner substantially complied with his available administrative remedies under Prison Litigation Reform Act (PLRA) with respect to his Eighth Amendment claims where he sought to be placed in administrative custody and after a hearing but was told that his grievance regarding his desire to be removed from general population and placed in administrative custody was "not addressed" under the grievance process." U.S.C.A. Const.Amend. 8; Civil Rights of Institutionalized Persons Act, § 7(a), 42 U.S.C.A. § 1997e(a).

4. Civil Rights ⇐205(1)

Liability under § 1983 cannot be imposed vicariously or under the theory of respondeat superior. 42 U.S.C.A. § 1983.

5. Civil Rights ⇐204.1

A § 1983 defendant's conduct must have a close causal connection to plaintiff's injury for liability to attach. 42 U.S.C.A. § 1983.

6. Civil Rights ⇐204.1

A defendant must have participated in or had knowledge and acquiesced in the alleged violation for liability to attach under § 1983. 42 U.S.C.A. § 1983.

7. Civil Rights ⇐207(2), 234

Allegations of participation or actual knowledge and acquiescence must be made with particularity, and the mere fact that a defendant may hold a supervisory position is insufficient to find liability under § 1983. 42 U.S.C.A. § 1983.

8. Civil Rights ⇐207(2)

Prison deputy superintendent could not be held liable for violation of inmate's Eighth Amendment rights for failure to protect him from attacks by other inmates where inmate failed to show any participation, knowledge or acquiescence in the alleged constitutional violation resulting from inmate's placement back in general prison population after a stabbing. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

9. Civil Rights ⇐17(4)

Prison official has a duty to protect prisoners from attacks by other inmates.

10. Civil Rights ⇐135, 207(1)

In order to impose liability under Eighth Amendment on prison official for breach of duty to protect inmates from attacks by other inmates, inmate must show that he was incarcerated under conditions posing a substantial risk of serious harm, and that official knew and disregarded an excessive risk to inmate's health and safety; official must both be aware of facts from which inference could be drawn that a substantial risk of serious harm exists, and he must draw the inference. 42 U.S.C.A. § 1983.

11. Federal Civil Procedure ⇐2491.5

Genuine issues of material fact existed as to whether prisoner, who suffered a serious assault when housed in general population, faced a substantial risk of serious harm and whether prison official was deliberately indifferent to prisoner's safety, precluding summary judgment in favor of official on prisoner's Eighth Amendment claim for failure to protect him from attacks by other inmates. U.S.C.A. Const. Amend. 8; 42 U.S.C.A. § 1983.

12. Federal Civil Procedure ⇐2491.5

Because prisoner presented sufficient evidence to create a genuine issue of material fact as to whether prison official was deliberately indifferent to prisoner's safety, summary judgment in favor of official was precluded on basis of qualified immunity on prisoner's Eighth Amendment claim for failure to protect him from attacks by other inmates. U.S.C.A. Const. Amend. 8; 42 U.S.C.A. § 1983.

Paul Hetznecker, Hetznecker & Meehan, Philadelphia, PA, for Plaintiff.

Dalinda E. Carrero, Office of Atty. General, Philadelphia, PA, for Defendants.

EXPLANATION & ORDER

ANITA B. BRODY, District Judge.

Plaintiff Richard Pearson ("Plaintiff"), an inmate currently housed at the State Correctional Institution at Somerset ("Somerset") and formerly incarcerated at the State Correctional Institution at Graterford ("Graterford"), brought this suit under 42 U.S.C. § 1983 against Graterford officials, Superintendent Donald Vaughn, Deputy Superintendent William Widner, Deputy Superintendent Thomas Stachelek, and Unit Manager John Murray. Plaintiff Pearson claims that when housed at Graterford in 1996, defendants failed to protect him against attack by other inmates in violation of his Eighth Amendment rights. Plaintiff contends that defendants violated his Eighth Amendment right to be free

from cruel and unusual punishment by housing him in the general population at Graterford and failing to place him in administrative custody in February 1996, although he was stabbed when incarcerated in general population at Graterford in 1994. Plaintiff seeks money damages. Defendants Vaughn and Murray move for summary judgment.[1]

I. PROCEDURAL HISTORY

Plaintiff filed his *pro se* complaint on November 7, 1997. On April 13, 1998, I granted plaintiff's motion for appointment of counsel. Defendants Vaughn and Murray filed their motion for summary judgment on September 3, 1999. Plaintiff's response was filed on October 5, 1999. In plaintiff's response to defendants' argument that plaintiff had failed to exhaust his available administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), plaintiff contended that he was not required to exhaust his administrative remedies. Plaintiff argued that the use of the administrative process would be futile because the grievance procedure could not provide him with the monetary relief that he seeks in this case.

On February 15, 2000, the Third Circuit issued its opinion in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir.2000). On March 9, 2000, because plaintiff's futility argument was rejected in *Nyhuis*, I ordered plaintiff to show cause why this case should not be dismissed for failure to exhaust available administrative remedies. On March 24, 2000, plaintiff submitted a supplement response regarding the exhaustion issue. Defendants filed a reply on April 6, 2000. In their reply, defendants argue that because plaintiff has failed to exhaust his administrative remedies, plaintiff's complaint should be dismissed. (Defs. Reply at 4, 6)

On April 24, 2000, I held a hearing regarding whether plaintiff exhausted his administrative remedies, specifically to address the February 27, 1996 and March 1996 Consolidated Inmate Grievance System forms ("grievance rejection") that plaintiff attached to his supplemental response.

II. FACTS[2]

Plaintiff was housed at Graterford on three separate occasions, in 1994, 1995, 1996. In March 1994, while imprisoned at Graterford in general population,[3] he was stabbed six times by several inmates in a hallway corridor.[4] As a result of his injuries, plaintiff was hospitalized. According to plaintiff, the Graterford Program Review Committee ("PRC") subsequently determined that he should be removed from and never returned to, the general population at Graterford because of the danger of another attack on his life. In August or September 1994, plaintiff was transferred to State Correctional Institution at Dallas ("Dallas") and subsequently paroled. In February 1995, he was arrested for a parole violation and housed at Graterford.

approximately 2–3 weeks, without incident,[5] before being transferred to State Correctional Institution Camp Hill ("Camp Hill") for classification.

While at Camp Hill, plaintiff signed two Acknowledgment of Orientation forms in which plaintiff indicated that he did not need separation from any named inmates at Camp Hill or any other state institution. (Defs. Mot. Summ. J. Ex. D–5 and Ex. D–6). According to plaintiff, he signed these forms because he did not know the names of the inmates from whom he needed to be separated. In addition, plaintiff believed that his only enemies were housed at Graterford and because of the 1994 assault he should not be returned to Graterford. On plaintiff's Diagnostic Classification Report, he signed his name under the words "no enemies." (Defs.Mot.Summ. J. Ex. D–4). Plaintiff then left Camp Hill and returned to Dallas.

On February 8, 1996, plaintiff was transferred from Dallas to Graterford for a parole board hearing, and placed in the general population on B–Block. Defendant Murray was B–Block Unit Manager. According to plaintiff, he told Murray about the 1994 assault at Graterford.[6] Murray told plaintiff that he would be locked in this cell until he left Graterford. Plaintiff did not identify the particular inmates from whom he sought separation. On February 9, 1996, plaintiff attended his parole board hearing. Following the hearing, plaintiff discovered that his cell was no longer double-locked. Plaintiff again told defendant Murray that he was concerned about being housed in general population. During this conversation, plaintiff requested that he be returned to Dallas. Plaintiff was housed at Graterford in administrative custody. Plaintiff was on the "New Side." The "New Side" housing blocks, G and H, are separate from the rest of the prison. (Pearson Dep. at 48–50). In March 1994 and in February 1996, the dates when plaintiff was attacked, he was housed on the "Old Side," on which B–Block is located. (Pearson Dep. at 49, 67).

According to plaintiff, he told two unknown officers that he had been previously harmed by inmates at Graterford. These individuals are not named as defendants in this case.

Plaintiff testified at his July 1999 deposition that he did "not recollect" filing a grievance requesting not to be housed in general population prior to the February 21, 1996 incident. (Pearson Dep. at 83). At the April 24, 2000 hearing,("hearing"), plaintiff testified that on February 9, 1996, he filed a grievance claiming that he should be removed from general population and placed in administrative custody. (Tr. 28–29, 45–46, 48, 51). Plaintiff testified that he did not receive copies of "a lot of the grievances" he filed. (Tr. at 26).[7]

On February 21, 1996, plaintiff was stabbed in the prison law library by three unknown inmates. Following the incident, plaintiff was treated for three puncture wounds on the back of his left shoulder blade. After the attack, plaintiff was interviewed by prison officials from the security office. He told them that he had been stabbed at Graterford in 1994. During the interview, plaintiff alleges that the security officers learned that plaintiff's custody records were still at Dallas. According to plaintiff, the security officers told him that he should never have been housed in general population at Graterford. Following the stabbing, plaintiff was placed in administrative custody. After he was released from medical hold, plaintiff returned to Dallas.

1. Defendants Vaughn and Murray bring this motion for summary judgment. These same defendants filed an answer to plaintiff's complaint. Plaintiff's response discusses only these defendants.

2. I ordered the parties to submit a joint stipulation of facts by June 9, 2000. To date, I have not received such a stipulation. On June 8, 2000, defendants provided their proposed stipulation of facts to my chambers. Defendants attached a letter stating that they were unable to contact plaintiff's counsel regarding a joint stipulation. Rather than delay the resolution of defendants' motion for summary judgment, I have set forth the following facts. Many of the facts are undisputed when in dispute, I have accepted plaintiff's version of events, drawing all reasonable inferences in plaintiff's favor.

3. In 1994, plaintiff was housed on the same unit where he was housed when returned to Graterford in 1996. (Pearson Dep. at 21, 67).

4. The 1994 attack was the basis of a suit by plaintiff in 1996, which was dismissed barred by the applicable statute of limitations. (Defs. Mot. Summ. J. at 2)

5. Plaintiff was transferred to State Correctional Institution Camp Hill ("Camp Hill") for classification.

6. Plaintiff told Murray about the 1994 assault at Graterford.

7. I gave plaintiff until May 12, 2000 to supplement the record by providing the court with a copy of the grievance filed February 9, 1996 and any other documents relevant to the exhaustion issue. Plaintiff did not produce any documents.

ruary 27, 1996, approximately one week after the incident, Mary Ann Williams, ("Williams"), grievance coordinator at Graterford, wrote "Mr. Pearson, Your custody level is not addressable under the grievance process. You should inform your counselor and security of your desire to remain under AC status " (Hearing Ex. B). Robert S. Bitner, ("Bitner"), Chief Hearing Examiner at the Department of Corrections, testified that administrative custody is considered a custody level. (Tr. at 82). On the bottom of a grievance rejection form dated March 5, 1996, Williams wrote "Mr. Pearson, You have already filed the same grievance. There is no need to file another one." (Hearing Ex. B1). Plaintiff testified that he may have filed a second grievance requesting to be removed from general population and placed in administrative custody and in response, he received the March 5, 1996 grievance rejection. (Tr. at 32). On March 4, 1996, plaintiff filed Grievance No. 0617–96 requesting that he be returned to Dallas because he feared for his safety at Graterford. (Defs. Mot. Summ. J. Ex. D–11; Hearing Ex. C). On March 7, 1996, Williams responded that plaintiff would remain at Graterford until medical hold was lifted. (Defs. Mot. Summ. J. Ex. D–11; Hearing Ex. D). Plaintiff did not appeal this response. Bitner testified, at the April 24, 2000 hearing, that he is responsible for handling all inmate grievance and misconduct appeals to final review. (Tr. at 71). Bitner also testified that based on his review of plaintiff's records, plaintiff did not file to final review a grievance appeal claiming that he had should have been placed in administrative custody or that he

8. In plaintiff's response to defendants' motion, plaintiff acknowledges that monetary damages are not available against defendants in their official capacities. Therefore, summary judgment will be granted as to plaintiff's claims for monetary damages against defendants in their official capacities.

institution. (Tr. at 81).

On March 5, 1996, plaintiff wrote defendant Vaughn regarding the Febru 21, 1996 stabbing, requesting that Vau inform his family about the incident that plaintiff be permitted to make a phone call to his family. (Defs.Mot.Sum J. Ex. D–12).

III. DISCUSSION

Defendants Vaughn and Murray moved for summary judgment. In motion for summary judgment, defend argue that: 1) plaintiff's claims should dismissed because he failed to exhaust ministrative remedies; 2) the Eleve Amendment bars damages against de dants Vaughn and Murray in their of capacity;[8] 3) defendants Vaughn and ray did not violate plaintiff's constitu rights; and 4) defendants Vaughn Murray are entitled to qualified immu

A. *Failure to Exhaust*

The PLRA, in relevant part, pro that:

> No action shall be brought with to prison conditions under section of this title, or any other Federal a prisoner confined in any jail, pr other correctional facility until su ministrative remedies as are av are exhausted.

42 U.S.C. § 1997e(a).

The Pennsylvania Department rections has created a Consolida mate Grievance Review System, DC 804 (effective October 20, 1994), VI, Procedures, sets forth a three-s mal grievance procedure. *See* DC 804 Section VI.[9]

9. First, a plaintiff-inmate must file grievance for initial review to the F gional Grievance Coordinator with days after the events upon which ance is based. *See* DC–ADM 804 Extensions of time may be granted cause. *See id.* Within ten workin receipt of the grievance by the Griev cer, "the grievant shall be provided plaintiff-inmate must exhaust his administrative remedies, even if the ultimate relief sought is not available through the administrative process. *See Nyhuis v. Reno*, 204 F.3d 65, 71 (3d Cir.2000) (stating that the PLRA exhaustion requirement applies to *Bivens* actions); *Booth v. Churner*, 206 F.3d 289, 300 (3d Cir.2000) (stating that the PLRA exhaustion requirement applies to § 1983 actions). "Compliance with the administrative remedy scheme will be satisfactory if it is substantial." *Nyhuis*, 204 F.3d at 77–78.

Defendants argue that plaintiff's failure to exhaust his available administrative remedies as required by § 1997e(a) mandates dismissal of this action. Plaintiff responds that he has exhausted his administrative remedies.[10] Plaintiff testified that he filed a grievance on February 9, 1996, asking prison officials to remove him from general population and place him in administrative custody. (Tr. at 28–29,45–

response to the grievance...." *Id.* at B.4. cond, an inmate may appeal this initial rmination, in writing, to the Facility Man- Community Corrections Regional Di- within five days from the inmate's re- of the decision. *See id.* at C.2. The diate review personnel have ten work- ys to notify the inmate of the decision. at C 4. Third, an inmate may appeal sposition of an appeal from initial re- the Central Office Review Committee ") within seven days of receiving the *See id.* at D.1. "Final review will permitted until the inmate has com- th all procedures established for Ini- ew and Appeal from Initial Review. ns may be made for good cause." .2. The CORC must issue a decision wenty-one days after receipt of an ppeal. *See id.* at D.7.

laintiff's supplemental response, al- ot well-articulated by plaintiff, it ap- he is arguing plaintiff substantially with DC–ADM 804, and therefore be permitted to bring his suit in urt.

ird Circuit has not yet clearly artic- ther the PLRA exhaustion require- s an affirmative defense or a con- edent to filing. Defendants did not ntiff's failure to exhaust as an affirmative defense in their answer. If an affirmative defense, the defendants have the burden of pleading and proving the defense in a motion for summary judgment or at trial. *See Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir.1997) (stating that in the context of a Title VII case, the failure to exhaust administrative remedies is an affirmative defense). An inmate's failure to comply with the PLRA's exhaustion requirement constitutes an affirmative defense. *See e.g., Massey v. Helman*, 196 F.3d 727, 735 (7th Cir.2000); *Jenkins v. Haubert*, 179 F.3d 19, 29 (2d Cir.1999); *Jackson v. District of Columbia*, 89 F.Supp.2d 48, 57 (D.D.C.2000). If a condition precedent to filing suit, plaintiff has the burden of proof. *See Jackson*, at 55 (noting that the Sixth Circuit requires inmate-plaintiffs to allege and show that they exhausted their administrative remedies and to attach documentary evidence of exhaustion to their complaint). As the discussion in this order will demonstrate, regardless of upon whom the burden is placed, plaintiff has exhausted his administrative remedies as to his claim that he should have been removed from general population and placed in administrative custody.

[2, 3] Considering the record before me, I determine that plaintiff has substantially complied with his available administrative remedies.[11]

The record supports plaintiff's assertion that the February 27, 1996 rejection was issued in response to plaintiff's February 9, 1996 grievance requesting to be removed from general population and placed in administrative custody.[12] In the Febru-

12. In addition to plaintiff's testimony that he filed a grievance on February 9, 1996, seeking removal from general population and placement in administrative custody, other evidence on the record supports his assertion. Williams was responding to plaintiff's February 9, 1996 grievance in the February 27, 1996 grievance rejection. Therefore, plaintiff argues that he has exhausted his administrative remedies because he was told by Williams that his custody status was not addressable under the grievance process. Defendants argue that the February 27, 1996 rejection was not written in response to plaintiff's alleged February 9, 1996 grievance.

ary 27, 1996 document, Williams referred to plaintiff's "desire to remain under AC status."[13] Defendants contend that Williams was responding to a request by plaintiff to remain in administrative custody after already being housed there; not a request to be moved from general population to administrative custody prior to the stabbing. However, I do not find this argument convincing. Rather, as plaintiff argues, the phrase, "remain under," seems to indicate that plaintiff sought to be placed in administrative custody and remain there until he was returned to Dallas.[14] Furthermore, despite their claim that Williams was responding to a grievance filed by plaintiff seeking to stay in administrative custody after the stabbing, defendants have not produced documentary evidence of such a grievance.[15] The record before me supports plaintiff's assertion that Williams' February 27, 1996 rejection was responding to plaintiff's February 9, 1996 grievance.

In plaintiff's deposition, he testified that on that date, his cell "was no longer double-locked." (Pearson Dep. at 72). Plaintiff testified that he then asked defendant Murray to be placed in administrative custody. (Pearson Dep. at 78–80). This supports plaintiff's testimony that his grievance requested that he be placed in administrative custody. Furthermore, in plaintiff's March 4 grievance, plaintiff states that he has "already written you three or four grievances." (Hearing Ex. C). Arguably, plaintiff's February 9, 1996 grievance is one of the grievances to which plaintiff refers.

13. The fact that the grievance rejection was dated February 27, 1996 does not necessarily indicate that the rejection was not in response to plaintiff's February 9, 1996 grievance. Although a grievance officer has ten working days to respond to an inmate's grievance, Bitner testified that no time limit exists when a response to a grievance will be in the form of a grievance rejection. (Tr. at 88–89).

14. In his deposition, plaintiff testified that he asked defendant Murray to be placed in administrative custody until he was transferred back to Dallas. (Pearson Dep. at 79). In his grievance, plaintiff may similarly have asked that he be placed in administrative housing and remain there until he was returned to Dallas.

15. I recognize that plaintiff has not produced a copy of the February 9, 1996 grievance. I also note, however, plaintiff's testimony that he did not receive copies of numerous grievances he filed.

Because Williams told plaintiff that his grievance regarding his desire to be removed from the general population and placed in administrative custody was "not addressable under the grievance process," defendants cannot assert in this lawsuit that plaintiff failed to exhaust this claim. *See Miller v. Tanner* 196 F.3d 1190, 1193 (11th Cir.1999) (determining that although an inmate-plaintiff failed to appeal the dismissal of his grievance, plaintiff exhausted his administrative remedies because plaintiff was told "[w]hen any grievance is terminated at the institutional level you do not have the right to appeal. The above listed grievance(s) is closed."). To the extent possible, plaintiff complied with the February 27 grievance rejection. As instructed by Williams, plaintiff spoke to his counselor. (Defs. Mot. Summ. J. at D–11; Ex. C). Based on the record, plaintiff has substantially complied with the grievance procedure set forth under DC-ADM 804.[16]

16. It is somewhat unclear what steps defendants contend that plaintiff should have taken following receipt of this rejection. Nonetheless, plaintiff has exhausted his administrative remedies. At the hearing, defendants testified that after plaintiff spoke to his counselor and he was not satisfied with the outcome, he should have refiled his grievance explaining that he followed Williams' instructions and the problem still exists. After receiving the notification stating that his custody status was not addressable, I determined that plaintiff was not required to refile. Even if required to refile, plaintiff testified that he may have filed a second grievance regarding his custody status and that the March 5, 1996 rejection was the response to such a grievance. (Tr. at 66). To the extent defendants argue that plaintiff should have completed steps two and three of the DC-ADM 804 grievance process, plaintiff is relieved of the requirement that he appeal his grievance to final review.

DM 804.[17]

Having determined that plaintiff has exhausted his administrative remedies with respect to his claim that he should have been removed from general population and placed in administrative custody before the stabbing on February 21, 1996, I will evaluate plaintiff's Eighth Amendment claims.

B. *Eighth Amendment*

In order to bring a successful § 1983 claim, a plaintiff must demonstrate: (1) that the challenged conduct was committed by a person acting under color of state law, and (2) that the conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or federal law. *Piecknick v. Pennsylvania*, 36 F.3d 1255–56 (3d Cir.1994); *Carter v. City of Philadelphia*, 989 F.2d 117, 119 (3d Cir.1993). It is undisputed that defendants were acting under color of state law. Therefore, the issue is whether defendants violated plaintiff's Eighth Amendment rights. I will first address plaintiff's claim that defendant Vaughn violated his Eighth Amendment rights. Second, I will evaluate plaintiff's claim that defendant Murray violated plaintiff's Eighth Amendment rights by failing to protect him against an attack by unknown inmates.

1. *Vaughn*

Liability under § 1983 cannot be imposed vicariously or under the grounds of respondeat superior. *See Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir.1988); *Rizzo v. Holmesburg Prison Officials*, 546 F.2d 1077, 1082 (3d Cir.1976). A defendant's conduct must have a causal connection to plaintiff's injury in order to attach. *See Martinez v. California*, 444 U.S. 277, 285, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). A defendant who participated in or had knowledge of and acquiesced in the alleged violation may be liable. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir.1997). Allegations of participation or actual knowledge and acquiescence must be made with particularity, *Rode*, at 1207, and the mere fact that a defendant may hold a supervisory position is insufficient to find liability, *Wilson v. Horn*, 971 F.Supp. 943, 947 (E.D.Pa. 1997).

[8] To show personal involvement by defendant Vaughn, plaintiff points to deposition testimony of defendant Vaughn that he signed the Extraordinary Occurrence Report outlining the 1994 stabbing of plaintiff. (Vaughn Dep. at 28). Plaintiff also asserts that "as superintendend (sic) had the responsibility to ensure that plaintiff was not placed back in general population" when he returned to Graterford. (Plaintiff. Resp. at 13). Plaintiff also states Vaughn was "in charge of the institution at Graterford." (Plaintiff. Resp. at 13). Defendants assert that defendant Vaughn cannot be held liable under Section 1983 because he was not personally involved in the alleged constitutional deprivation.

Plaintiff has not offered any evidence demonstrating that Vaughn has personal involvement in the alleged violation of plaintiff's Eighth Amendment rights. With respect to the 1996 incident, Vaughn stated that he was not involved in deciding plaintiff's placement in general population. (Vaughn Dep. at 83). Both plaintiff and Vaughn testified that before the February 21, 1996 incident, plaintiff did not contact Vaughn about his desire to be removed from general population. (Pearson Dep. at 83; Vaughn Dep. at 77). Plaintiff's reliance on defendant Vaughn's supervisory role is not an appropriate basis for liability in this case. Therefore, because plaintiff has failed to show any participation, knowledge or acquiescence in the alleged constitutional violation, I will grant summary judgment as to defendant Vaughn.

that his claim was not grievable under the grievance process. (Tr. at 66).

2. *Murray*

[9–11] Plaintiff asserts that defendant Murray violated his Eighth Amendment right by failing to protect him from the February 21, 1996 attack. A prison official has a duty to protect inmates from attacks by other inmates. *See Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). To prevail on a failure to protect claim, an inmate must make two showings. First, an inmate must show that "he is incarcerated under conditions posing a substantial risk of serious harm." *Id.* at 834, 114 S.Ct. 1970. Second, an inmate must show that the official "knows and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837, 114 S.Ct. 1970. To survive a summary judgment motion, a plaintiff must show "sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation." *Hamilton v. Leavy*, 117 F.3d 742, 746 (3d Cir.1997) (internal citations omitted).

a. Substantial risk of serious harm

A prisoner must demonstrate that "he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer* 511 U.S. at 834, 114 S.Ct. 1970. In determining whether the risk of an inmate being assaulted by other inmates is sufficiently serious to trigger constitution protection under the Eighth Amendme "the focus must be, not the extent of physical injuries sustained in the atta but rather the existence of a substant risk of serious harm." *Thomas v. Vaug* No. 97–6929, 1998 WL 647270 * 5 (E.D. September 21, 1998) (internal citatio omitted). Defendants claim that plaintif general fear for his safety does not est lish a substantial risk of serious harm. support of this assertion, defendants re to two cases in which courts have held a general fear of harm is not sufficient establish that plaintiff faced a substa risk of serious harm. *See Turner v. B* No. 96–35383, 1997 WL 51558 *2 (9th Feb.6, 1997) (unpublished disposition) *Davis v. Scott*, 94 F.3d 444, 447 (8th 1996).[18]

In this case, plaintiff has presented dence upon which a factfinder could clude that plaintiff was subjected to stantial risk of serious harm. Plaintif defendant Murray that he had suffe serious assault at Graterford when h in general population in 1994 and for his safety in general population defendant Murray's deposition, he te that he would have placed plaintiff ministrative custody if plaintiff had him to do so. (Murray Dep. at 40). tiff testified that prison officials fro security office told plaintiff that he not have been housed in general p tion because he was attacked at Grat in 1994. (Pearson Dep. at 90–91). Therefore, plaintiff has created a genuine issue of material fact as to whether plaintiff faced a substantial risk of serious harm.

b. Deliberate indifference

Plaintiff must also show that the harm suffered resulted from defendant Murray's deliberate indifference to plaintiff's safety. *Hamilton*, 117 F.3d at 747. Plaintiff must present evidence 1) that the defendant was aware of facts from which he could infer a substantial risk of serious harm and 2) that defendant actually drew that inference. *See Farmer*, 511 U.S. at 837, 114 S.Ct. 1970. When evaluating whether a prison official was deliberately indifferent, a court must "focus [on] what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be)." *Hamilton*, 117 F.3d at 747 (quoting *Farmer*, 511 U.S. at 837, 114 S.Ct. 1970).

Defendants contend that defendant Murray did not act with deliberate indifference by failing to place plaintiff in administrative custody. In support of this position, defendants argue that because Murray's alleged comments did not provide Murray with the names of particular inmates whom he feared would harm him, Defendant Murray did not act with deliberate indifference to plaintiff's safety.

Plaintiff testified that he informed Murray on at least twice, that he was stabbed and housed at Graterford in 1994 and concerned for his safety in general population. When plaintiff requested that he be placed in administrative custody, plaintiff explained that he had suffered a serious assault at Graterford. Defendant Murray does not recall having any conversation with plaintiff. (Murray Dep. at 25). Murray testified that plaintiff did not request to be removed from general population. (Murray Dep. at 40). Plaintiff asserts that Murray informed plaintiff that he had checked plaintiff's file. Murray told plaintiff that because plaintiff was housed in general population, housing plaintiff in administrative custody was unnecessary. However, according to plaintiff, Murray could not have checked his file because his records were still at Dallas. Plaintiff was not placed in administrative custody until after the February 21, 1996 stabbing.

Taking plaintiff's version of the facts as true, I conclude that a genuine question of material fact exists as to whether defendant Murray was deliberately indifferent to plaintiff's safety.

Because a genuine issue of material fact exists regarding the substantial risk of serious harm and defendant Murray's deliberate indifference, granting summary judgment as to defendant Murray is not appropriate.

C. *Qualified Immunity*

[12] Defendant Murray argues that he is shielded from liability by qualified immunity. "As government officials engaged in discretionary functions, [d]efendants are qualifiedly immune from suits brought against them for damages under section 1983, 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Sherwood v. Mulvihill*, 113 F.3d 396, 398–99 (3d Cir. 1997) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Thus, *Harlow* provides the court with an objective standard against which to measure the official's actions. When applying this objective standard, the court must resolve two issues: (1) Has the plaintiff stated a violation of a constitutional or federal statutory right? *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); and (2) If so, was that right clearly established, i.e., were the "contours of the right . . . sufficiently clear that a reasonable official would understand that what [he or she] is doing violates that right"? *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523

18. In *Turner*, a inmate who was a material witness against his former cellmate, claimed that prison officials failed to protect him by placing him in general population. 1997 WL 51558 *2. According to the inmate, he notified officials that his cellmate had friends at the prison and that he feared for his safety, however, he did not identify those inmates whom he feared. *See id.* Plaintiff was subsequently attacked. *See id.* The court determined that "plaintiff had expressed only a general fear of harm by other inmates and failed to create a general issue of triable fact as to the risk of serious harm." *Id.*

Similarly, in *Davis*, an inmate alleged that prison officials had failed to protect him from an assault by another inmate. 94 F.3d at 445. The inmates on plaintiff's enemies l no longer incarcerated at the prison at 446. However, the inmate told pri cials that he believed friends of his d enemies would try to harm him if the was returned to general population When returned to general population mate was hit on the back of his head The court held that because plaintiff provided the prison officials with th of inmates whom he feared, he had onstrated that a specific threat to existed. *See id.* Unlike the facts *Turner* and *Davis*, plaintiff had been harmed while housed in general popu Graterford.

(1987); *see also Rouse v. Plantier*, 182 F.3d 192, 200 (3d Cir.1999).

Defendant Murray asserts that he did not violate a clearly established constitutional right because plaintiff expressed only a general fear for his safety. At the time of the events at issue, the law clearly established that prison officials have a duty to protect prisoners from attacks by other prisoners. *See Farmer v. Brennan*, 511 U.S. at 833, 114 S.Ct. 1970. "A prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *See id.* at 828, 114 S.Ct. 1970. Because plaintiff has presented sufficient evidence to create a genuine issue of material fact as to whether defendant Murray was deliberately indifferent to plaintiff's safety, granting summary judgment on the basis of qualified immunity is not appropriate.[19]

AND NOW, this __ day of June, 2000, **IT IS ORDERED** that:

1. Defendants' motion for summary judgment (Docket Entry # 27) is **GRANTED** as to defendant Vaughn;

2. Defendants' motion for summary judgment (Docket Entry # 27) is **GRANTED** as to plaintiff's claims for money damages against defendant Murray in his official capacity; and

3. Defendants' motion for summary judgment (Docket Entry # 27) is **DENIED** as to defendant Murray in his individual capacity.

19. The following issues in this case remain unresolved: 1) in plaintiff's complaint, he brings suit against defendants under 42 U.S.C. § 1983, § 1985, § 1986 alleging that defendants violated his right to equal p... tion under the Fourteenth Amendment; 2) whether defendants Winder and St... remain part of this litigation.

Carl CLARK, David Barger and Edwar... Schwab, individually, and on behalf ... all others similarly situated, Plain... tiffs,

v.

WITCO CORPORATION, Defendant.

No. CIV. A. 98–300 ERIE.

United States District Court, W.D. Pennsylvania.

Jan. 13, 2000.

Former employees brought act... against employer to recover severa... benefits under division-specific emplo... handbook after their division was sold. ... employer's motion for summary judgmen... the District Court, McLaughlin, J., he... that: (1) severance policy in employe... company-wide personnel manual, not s... erance policy in handbook, applied to d... termine employees' rights, and (2) def... of severance benefits was reasonable u... der plan.

Motion granted.

1. Pensions ⇐68, 122

Employer's division-specific emplo... handbook had adequate amendment pr... dure, and thus subsequently enacted ... erance policy in employer's company... personnel manual, not severance pol... handbook, applied to determine righ... employees affected by sale of div... even if revised amendment procedu... manual was not disseminated to em... ees; handbook and manual were int... to be read together, manual's purpos... to "keep current with the latest de... ments in personnel policy and proce... as they are approved," and manual ... fied particular committees within co... that had authority to amend policy. ...

ployee Retirement Income Security Act of 1974, § 402(b)(3), 29 U.S.C.A. § 1102(b)(3).

2. Pensions ⇐68

Employer's denial of severance benefits to employees who continued their employment at plant with after sale of division was reasonable under severance policy that expressly provided that employees were not entitled to receive benefits if their termination of employment from employer was result of "sale of stock or assets." Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

John Paul Garhart, Arthur D. Martinuc... Quinn, Buseck, Leemhuis, Toohey & ...rpto, Inc., Erie, PA, for Plaintiffs.

Thomas A. Donovan, Kirkpatrick & ...ockhart, Pittsburgh, PA, Kenneth A. ...argolis, Laura Sack, Kauff, McClain & ...cGuire, New York City, for Defendant.

MEMORANDUM OPINION AND ORDER

...cLAUGHLIN, District Judge.

...is civil action arises out of the sale of ...finery and blending and packaging ... in Bradford, Pennsylvania. Plain... claim they are entitled to severance ...its because the sale effectively ended ... employment relationship with the ...dant. Presently pending before the ... is Defendant's Motion to Dismiss or, ...lternative, for Summary Judgment. ... of the following reasons, the motion ...ted.

I. Background

...endant Witco Corporation ("Witco") ...lobal specialty manufacturer with ...ous facilities located throughout the ...States and around the world. *See* ...an Aff. ¶ 2. In the past, it owned ...endall/Amalie Division which was ...rts Lubricants Group. *See id.* ¶ 4. ...owned a refinery and blending and ...g plant in Bradford, Pennsylvania ("Bradford Refinery"). *See id.* ¶ 5. Plaintiffs David Barger, Carl Clark and Edward Schwab are all former employees of Witco; they for worked for Witco at the Bradford Refinery until February 28, 1997, the date it was sold. *See* Barger Aff. ¶¶ 2–3; Clark Aff. ¶¶ 2–3; Schwab Aff. ¶¶ 2–3.

On October 1, 1976, Witco issued a handbook ("Bradford Handbook") which was a site-specific procedures manual. *See* Tabakman Aff. ¶ 19. It complemented and did not supercede or supplant the more comprehensive Witco Personnel Manual. *See id.* The Bradford Handbook included a severance benefit policy which provided, "In any instance where the Company terminates employment through no fault of the employee and provided the employee has not reached age sixty-five (65) or has not become totally disabled, such employee shall be entitled to a lump sum severance pay." Sack Aff. Ex. A at 20. The severance benefit would be calculated according to years of service but was not to exceed fifty days pay. *See id.*

Between 1978 and 1997, Witco adopted at least eight different severance policies including in 1978, 1981, 1983, 1987, 1991, September 1995, November 1995 and 1997. *See* Tabakman Aff. ¶ 20. Each of these policies provided that employees whose employment was continued by a successor company were not eligible for severance benefits. *See id.* In November of 1995, Witco announced that it planned to divest its Lubricants Group. *See id.* ¶ 6. It informed its employees that it had designed a severance program for Lubricants Group employees not offered employment with the buyer or within Witco; according to Witco, the program was more generous than that established in the 1976 handbook. *See id.* ¶ 7. The letter provided, "If you are not offered employment with the prospective buyer(s), or within Witco, you will be entitled to . . . an enhanced severance pay program [which will provide] 1 ½ weeks pay for each year of service, with a minimum of 12 weeks and a maximum of 52 weeks." *Id.* Ex. A. It also stated,